

Information held by a public authority for the purposes of the EIR (regulation 3(2))

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains the circumstances in which information is considered to be held by a public authority for the purposes of the EIR.

Overview

- Information in the possession of, and produced or received by, a public authority is held for the purposes of the EIR.
- However, information is not considered to be in the possession of the public authority if it is not being held to any extent for its own purposes.
- In the same way, information is considered to be received or produced by the authority if it relates to the business of the authority.
- When information is held by another person on behalf of a public authority, the information is held by the public authority for the purposes of the EIR.

What the EIR say

5. Regulation 3(2) states:

3.—(2) For the purposes of these Regulations, environmental information is held by a public authority if the information—

- (a) is in the authority’s possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Information in the authority’s possession and produced or received by it

6. Unlike the definition of information held for the purposes of the Freedom of Information Act 2000 (FOIA), the EIR do not explicitly exclude information held by a public authority solely on behalf of another person or body. However, in the Commissioner’s view, information that is in the possession of the authority, and either produced or received by it or is held for its own purposes, is to be considered as held for the purposes of the EIR. In practice this means that although there are differences between the EIR and FOIA in the wording of the definition of information held, in fact similar principles will apply.
7. The use of the phrase “in the authority’s possession” could indicate that the scope of what is held under the EIR is much wider than under FOIA, as this may include information that is not held for the authority’s own purposes. However, the Commissioner considers that information is not in the public authority’s “possession” if it is not being held to any extent for its own purposes. This means, for example, that information which is simply stored by an authority on behalf of someone else is not “held” for the purposes of the EIR.
8. In addition, it is important also to note that regulation 3(2) requires the information to be “produced or received” by the

authority. This means that information produced by a member of the public authority's staff in their private capacity would not be held by the authority even if it is on the authority's premises or computer systems.

Example

The situation of a local councillor provides a good illustration of this issue as elected members of a council are likely to have a number of different roles. Some will relate to their function as elected members (such as corresponding with residents in their ward, discussing council business with fellow members in the context of voting strategy or campaigning on behalf of a political party) and others will relate to the functions of the local authority (such as being a cabinet member with responsibility for a service area, carrying out administrative functions or representing the authority, for example on a regional forum).

Information produced or received by councillors may be held on their own computers or in their own homes or offices, or it may be held on local authority premises or computer systems. However, the purpose of the information and the capacity in which it is being held is more helpful when deciding whether information is covered by the EIR.

Local authorities are public authorities for the purposes of the EIR, but individual elected members are not. Therefore, information held by councillors for their own purposes will not be covered by the EIR, but information they hold on behalf of, or as part of, a local authority will be. Whereas information created or received by a councillor and held on a local authority's premises or computer system will be held by the authority under the EIR, if it relates to the functions of the authority (for example in the councillor's capacity as a cabinet member of the authority), it will not be held for the purposes of the EIR if it was produced by the councillor for private or political purposes and the authority is just providing storage, office space or computing facilities. This is because the authority is not holding the information to any extent for its own purposes.

9. Although the phrase “received by” at first sight suggests that a wider range of information is caught by the EIR, in practice there is no real difference to FOIA because this will, in most cases, refer to situations where there is a positive reason for sending information to a public authority (i.e. which is received by it). In other words, information is received by a public authority because it relates to the work of the authority. Therefore, it can be considered to be held for the purposes of the EIR.
10. This means that a public authority will need to establish whether information is held to any extent for its own purposes. If it is, it will be in its possession and so held for the purposes of the EIR.

Information held to any extent for the public authority’s own purposes

11. As with determining whether a public authority holds information for the purposes of FOIA, there are various factors that will assist in determining whether information is held for the purposes of the EIR because it is in the public authority’s possession and used for its own purposes, even if it is also held on behalf of another person. The weight attached to each factor will vary from case to case. In some circumstances, one factor may outweigh the others.
12. For example, it is unlikely that information is held to any extent for the purposes of the public authority where:
 - The authority has no access to, use for, or interest in the information;
 - The authority does not, at its own discretion, create, record, file or remove the information; or
 - The authority merely provides physical or electronic storage facilities.
13. As indicated, these factors are not definitive and they only offer assistance to a public authority in determining whether information is held.

14. Information that is not held to any extent for its own purposes is likely to be held solely on behalf of another person.
15. There are several factors that are likely to indicate that information is also held by the public authority, including:
 - Provision by the authority of clerical and administrative support for another person, whether a legal requirement or not.
 - The authority controls access to the information.
 - The authority takes its own decisions about what information is retained, altered or deleted.
 - The authority handles enquiries about the information.
 - The authority includes costs arising from holding the information in its overall budget.
16. It is important to note that these five factors are only indicative of whether information is held by a public authority for the purposes of the EIR. In this respect, it is important that authorities do not adopt a formulaic approach when considering the purpose(s) for which the information is held. The five factors will not necessarily provide the full picture, and, as the Information Tribunal stated when considering similar issues under FOIA ([*McBride v Information Commissioner and Ministry of Justice \(EA/2007/0105; 27 May 2008\)*](#)), an authority should always determine whether information is held on the evidence of each individual case.
17. There are also circumstances when a public authority 'holds' information relating to its role in another capacity, which means that it is not held to any extent for its own purposes under the EIR. For example, this will apply when a public authority acts as a charity trustee, as in the case of a local authority that holds assets such as playing fields and community halls in trust for the benefit of local residents. Information held in such a capacity is not held, to any extent, by the local authority for its own purposes as a public authority under the EIR, because, under charities' law, trustees must act only on behalf of the charity and not in their own interests. However, this does not mean that no information about the charity or the authority's role as trustee can be held for the

purposes of the EIR. For example, the authority may hold some of this information for its own purposes, and this will be determined on a case by case basis. Authorities are therefore advised to make a clear distinction between information held on behalf of a charity and information held for their own purposes.

Information held by another person on behalf of the public authority

18. There are several circumstances in which information is held by another person on behalf of the public authority and therefore held by the public authority for the purposes of the EIR. Some examples of this are included below.
19. **Contracted document storage** – this is a relatively common arrangement and includes complex storage and retrieval systems as well as arrangements for the keeping of legal documents by a firm of solicitors. In these situations the stored documents will be held on behalf of the public authority.
20. **Local archives and record offices** – public authorities will often store documents in these locations and, as with contracted storage, the information in these documents is held on behalf of the public authority. Even though the records offices are themselves likely to be public authorities, the responsibility for dealing with requests for the information remains with the public authority which holds the information for the purposes of the EIR.
21. **Contractual arrangements** – where information is held by a third party as a result of contractual arrangement, the provisions of the contract may indicate whether or not the information is held on behalf of the public authority.

Example

Both the public authority and the contractor agreed that the following applied to a market research project:

“Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all

hard and soft copy data must be given over to the council, with no copy remaining – electronic or paper – external to the council. The council has full ownership of the data...”

The Information Commissioner decided that data generated by the contractor falling within this provision was held on behalf of the council.

[ICO Decision Notice FS50118044](#)

This was an FOIA case, but the principles illustrated apply equally to the EIR.

22. **Information held by solicitors** – in cases where legal advice has been sought by a public authority client, the question is whether the file held by the solicitor is held on behalf of the public authority or whether the solicitor holds the information in its own right, in which case it would not be held for the purposes of the EIR. In general, documents held by a solicitor in connection with instructions they have received are held on behalf of the client.
23. **Other situations creating an agency arrangement** – these include anyone acting in a professional field who is recognised as acting as their client’s agent. This may also extend to situations where another body carries out the functions of a public authority, either through statute or contractual arrangements. When an agency arrangement exists, the situation regarding information held by the agent on behalf of the public authority client is similar to that between solicitor and client.
24. **Information held on behalf of a public authority as a result of partnership or consortia arrangements** – when public authorities work in partnership or in a consortium (ie those arrangements which do not have the legal status of a body or organisation separate to the individual partners), they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards. Examples include:

- local strategic partnerships
 - road safety partnerships
 - local environment partnerships
 - economic partnerships
25. In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there are various partnership arrangements it is not possible to provide guidance that will cover all of them. Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them.

Practical considerations

26. In order to comply with the requirements of the EIR, public authorities clearly need to know what information they hold for the purposes of the EIR. This means they need to be aware of information they are solely holding for another person, and information that is being held on their behalf by other persons.
27. With regard to the former, public authorities need to know the basis on which they hold information that is in their possession. With regard to the latter, authorities should know what information is held on their behalf by another person, and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made for it.
28. Good records management is important in this context. Public authorities are advised to follow the good practice which is set out in the Lord Chancellor's Code of Practice under section 46 of FOIA. This includes, for example, a section on records that are shared with other bodies or held on their behalf by other bodies.

Other considerations

29. Additional guidance is also available if you need further information on:

Holding information

- ⇒ see [Information held by a public authority for the purposes of the Freedom of Information Act](#)
- ⇒ see [Determining whether information is held](#)
- ⇒ see [Official information held in private email accounts](#)
- ⇒ see [Freedom of information legislation and research information: guidance for the higher education sector \(section on information held\)](#)

Records management

- ⇒ see the [Code of Practice under section 46](#)

More information

30. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
31. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please [Contact us: see our website \[www.ico.org.uk\]\(http://www.ico.org.uk\)](#).